No. 03-1520

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Kennedy Building Associates,

Plaintiff-Appellee,

vs.

Viacom, Inc.,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

APPELLANT'S BRIEF

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SUMMARY AND REQUEST FOR ORAL ARGUMENT

Appellee Kennedy Building Associates ("KBA") owns an industrial site in Minneapolis ("the Site"). KBA sued appellant Viacom, whose corporate predecessor Westinghouse had sold the Site in 1980. Viacom did not dispute at trial, and does not dispute in this appeal, that the Site contains PCBs and that Westinghouse's electric transformer repair operations were the primary source of the PCBs. The PCB presence resulted from typical industrial activities that occurred before the regulation of PCBs. Months before trial, Viacom agreed to clean-up the Site to standards to be set by the Minnesota Pollution Control Agency.

Despite these facts, and although the jury found that Westinghouse was not negligent, KBA obtained a judgment in its favor under federal and Minnesota environmental statutes and on a claim for strict liability in tort. The district court awarded statutory damages, strict liability damages, punitive damages, attorneys' fees, and prejudgment interest, totalling more than $6 million. The court also entered an injunction requiring Viacom to clean up the Site. Appellant contends that the strict liability judgment and the award of punitive damages are contrary to law and that the claim for injunctive relief was moot before trial began. It challenges the awards of attorney fees and prejudgment interest.

Viacom requests oral argument of 20 minutes per side.

CORPORATE DISCLOSURE STATEMENT

Appellant Viacom, Inc. has no parent corporation. No publicly held corporation owns 10% or more of its stock.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

FEDERAL CASES

MINNESOTA CASES

CASES FROM OTHER JURISDICTIONS

FEDERAL STATUTES AND RULES

MINNESOTA STATUTES

OTHER AUTHORITIES

CITATIONS TO THE RECORD IN APPELLANT'S BRIEF

Materials included in the Addendum are cited by page number ("Add. ___"); all such materials are also included in Appellant's Appendix, but a parallel citation is not included in the Brief. Materials included in Appellant's Appendix are cited by the Appendix page number ("App. ___"); trial exhibits are also cited by their exhibit number ("JX" for Joint Exhibits, "PX" for Plaintiff's Exhibits, and "DX" for Defendant's Exhibits), and trial testimony is cited by transcript volume and page number (*e.g.*, Tr. V/166-67).

JURISDICTIONAL STATEMENT

This Court has jurisdiction pursuant to 28 U.S.C. § 1291. Viacom appeals from a final judgment of the United States District Court for the District of Minnesota, by the Honorable James M. Rosenbaum, District Judge (Add. 4), and from orders entered by that court on the parties' post-trial motions. The order denying appellant's post-trial motions was entered on August 5, 2002. (Add. 14.) Viacom filed a precautionary notice of appeal on September 4, 2002. (App. 94.) Because appellee's post-trial motion for prejudgment interest was still pending on that date, however, that notice of appeal probably was premature. Osterneck v. Ernst & Whinney, 489 U.S. 169 (1989). After the district court entered its February 4, 2003, order disposing of appellee's motion (Add. 30), Viacom timely filed an amended notice of appeal on March 4, 2003 (App. 112), in accordance with F. R. App. P. 4(a)(4)(B)(ii).

The jurisdiction of the district court was based on 28 U.S.C. §§ 1441 and 1332. The action was removed from Minnesota state court because it was between citizens of different states and the amount in controversy exceeded $75,000.

STATEMENT OF ISSUES

1. Did the district court improperly extend common-law strict liability in tort beyond its traditional parameters under Minnesota law, by holding that a former property owner could be strictly liable to a subsequent owner of the same property for activities conducted by the former owner on the property?

Rylands v. Fletcher, (1868) LR 3 H.L. 330

Mahowald v. Minnesota Gas Co., 344 N.W.2d 856 (Minn. 1984)

Rosenblatt v. Exxon Co., 642 A.2d 180 (Md. 1994)

Wellesley Hills Realty Trust v. Mobil Oil Co., 747 F. Supp. 93 (D. Mass. 1990)

2. Can a strict liability claim for property damage alone support recovery of punitive damages under Minnesota law and the United States Constitution, particularly when the jury found that the underlying conduct was not even negligent?

U.S. Constitution, amendment XIV

State Farm Mutual Automobile Insurance Co. v. Campbell, __ U.S. ___, 2003 WL 1791206 (April 7, 2003)

Eisert v. Greenberg Roofing & Sheet Metal Co., 314 N.W.2d 226 (Minn. 1982)

Jensen v. Walsh, 623 N.W.2d 247 (Minn. 2001)

3. Did KBA's claim for injunctive relief under the Minnesota Environmental Rights Act become moot when Viacom entered into a Consent Order with the Minnesota Pollution Control Agency to clean up the Site?

Comfort Lake Association, Inc. v. Dresel Contracting, Inc., 138 F.3d 351 (8th Cir. 1998)

Mississippi River Revival, Inc. v. City of Minneapolis, 319 F.3d 1013 (8th Cir. 2003)

Orange Environment, Inc. v. County of Orange, 923 F. Supp. 529 (S.D.N.Y. 1996)

Minn. Stat. § 116B.03, subd. 1

4. Did the district court improperly award attorneys' fees and prejudgment interest, where the bulk of legal services related to causes of action that do not provide for attorneys' fees and where Viacom's written settlement offer exceeded the compensatory damage award at trial?

Hensley v. Eckerhart, 461 U.S. 424 (1983)

Marek v. Chesny, 473 U.S. 1 (1985)

Musicland Group, Inc. v. Ceridian Corp., 508 N.W.2d 524 (Minn. App. 1993)

Hodder v. Goodyear Tire & Rubber Co., 426 N.W.2d 826 (Minn. 1988)

Minn. Stat. § 549.09, subd. 1

STATEMENT OF THE CASE

I. Introduction

Viacom did not dispute at trial, and does not dispute in this appeal, that the Site contains PCBs and that Westinghouse operations were the primary source of the PCBs. But there is no evidence that Westinghouse intentionally deposited PCBs at the Site. On the contrary, the jury found that Westinghouse was not even negligent. The contamination resulted from typical industrial activities that occurred over the course of decades, before the regulation of PCBs.

This could and should have been a simple environmental clean-up project. Once it confirmed that Westinghouse actually had owned the Site, Viacom never disputed that it would be primarily responsible for the past and future clean-up costs. Viacom is cooperating with the Minnesota Pollution Control Agency to determine appropriate future environmental action at the Site and will conduct such action as directed by the MPCA. Nevertheless, KBA sought even greater financial and injunctive relief.

In this appeal, Viacom challenges (1) compensatory and punitive damages awards that conflict with Minnesota law; (2) an injunction for future action at the Site that impinges upon the exclusive authority of the MPCA based on a claim that was moot before trial began; and (3) awards of attorneys fees and prejudgment interest that exceed the statutory authority on which they purport to be based.

II. Procedural History

This action involves an industrial site in Minneapolis, Minnesota ("the Site") that was once owned by Westinghouse Electric Corporation (a corporate predecessor of appellant Viacom). Over the course of several decades, Westinghouse used the Site to repair electrical equipment, including electrical transformers containing polychlorinated biphenyls ("PCBs"). Westinghouse sold the Site in February 1980 to Hillcrest Development. Hillcrest sold the Site in August 1982 to Gerald Trooien (the principal owner of KBA), who subsequently conveyed it to KBA. By at least early 1997, KBA definitely knew that the Site contained PCBs.

In October 1999, KBA filed this action in Minnesota state court. (App.27.) Defendant (at that time CBS Corp., the successor of Westinghouse, which later merged with Viacom) removed the action to the United States District Court for the District of Minnesota. (App. 38.) Ultimately, KBA asserted state and federal statutory claims[1] and common-law claims for negligence, nuisance, and strict

[1] KBA asserted claims under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9601 *et seq.*; the Minnesota Environmental Response and Liability Act ("MERLA"), Minn. Stat. chap. 115B; and the Minnesota Environmental Rights Act ("MERA"), Minn. Stat. chap. 116B.

liability for conducting an "abnormally dangerous" activity. (App. 42-55.) It also sought punitive damages. (*Id.*)

The trial ran from January 29, 2002, until February 11, 2002. The jury, whose verdicts on the statutory claims were advisory, found in favor of KBA on its claims under CERCLA and MERLA and found that KBA had incurred response costs under those statutes of $106,393.23. It also found for KBA on its claims under MERA. On the common-law claims, the jury found for Viacom on the claims for negligence and nuisance but found for KBA on the strict liability claim, awarding KBA compensatory damages of $225,000.00 and punitive damages of $5,000,000.00. (Add. 1-3.)

On May 31, 2002, the court entered its own findings of fact and conclusions of law on the reserved statutory claims, adopting the jury's findings in most respects. (Add. 4-12.) It found that there was sufficient evidence to support the jury's verdicts on the common-law claims and the jury's damage awards. (Add. 12.) Citing MERA, it issued a mandatory injunction that required Viacom to "remediate the site's soil, groundwater, and building interior so that the previously-placed deed restriction may be removed, pursuant to Minn. Stat. § 116B.07." (*Id.*) Judgment was entered on May 31, 2002. (App. 92.)

KBA and Viacom each filed timely post-trial motions. Viacom moved for amended findings and conclusions and for a new trial. KBA sought prejudgment

interest and attorneys' fees under MERLA. By Orders dated August 6, 2002, the district court denied Viacom's motions without explanation (Add. 14) and referred KBA's motions to the Magistrate Judge for report and recommendation. On December 10, 2002, the Magistrate Judge recommended an award of $41,677.89 in prejudgment interest and $1,113,915 for attorney's fees, expert witness fees, and costs. (Add. 15-29.) On February 4, 2003, the district court adopted the magistrate judge's recommendations *in toto* without comment. (Add. 30.)

Viacom has partially satisfied the judgment in favor of KBA, in the amount of $108,475.62, allocated to payment of principal and post-judgment interest on the MERLA and CERCLA claims. (App. 114.) Viacom appeals from the remainder of the judgment.

STATEMENT OF FACTS

PCBs are a man-made chemical, developed in the late 1920s. For about 50 years, they were widely used in a variety of industrial applications. (Tr. II/25-26, App. 228.) As a result, PCBs are "widely dispersed in the environment and are found worldwide at low concentrations." 44 Fed. Reg. 31514, 31516 (May 31, 1979). In 1979, the Environmental Protection Agency restricted most uses of PCBs. *Id.* Because of PCBs' low flammability, oil and other solvents containing PCBs were used for many years before 1979 as an insulating fluid in electric transformers in applications where fire resistance was particularly important. (Tr. II/25-26; App. 228.) "Askarels" are the insulating fluids containing PCBs that are used in transformers. The EPA has estimated that less than one percent of all transformers in service as of 1979 contained askarels. 44 Fed. Reg. at 31530.

The Site is a 0.9 acre parcel (about one-quarter of a city block) located in an older industrial area of northeast Minneapolis that is zoned for "limited manufacturing." (DX 448, App. 167.) About half of the Site is occupied by a five-story building erected in 1922 with a subsequent one-story addition. Westinghouse repaired electric transformers at the Site for more than 50 years. The building is currently used for offices, warehouse space, and light manufacturing. (*Id.*) The building's tenants and visitors use the rest of the property for parking. Appraisals have described the property's present use as its "highest and best." (*Id.*, App. 168;

see also DX 466, App. 186-87.) The value of the Site fluctuated over a fairly narrow range from 1983 to 1997, with a low value of $882,700 (JX 23, App. 129) and a high of $1.3 million (DX 448, App. 164; *see also* DX 560, App. 189; DX 466, App. 183).

Whatever Hillcrest may or may not have known about PCBs at the Site, it appears that Hillcrest gave no warning to Gerald Trooien/KBA about possible PCB contamination when Hillcrest sold the Site in 1982. (Tr. V/51, App. 229.) A long-time tenant of the building testified, however, that all of the tenants knew that the Site had once been a Westinghouse facility and that there was "generally a certain amount of oil around," including a sign on the pump for an underground oil storage tank that said "Transformer Oil." (Tr. V/140, 135, App. 236-37.)

Around 1990, KBA commissioned an environmental assessment of the Site in connection with refinancing the mortgage. The consultant's draft report, which was provided to KBA for review, noted that "[t]he presence of a transformer oil storage room raises the possibility of PCB contamination of the facility or soil from spilled oils." (DX 455, ¶ 7.1, App. 175.) After review and comment by KBA, this warning did not appear in the final environmental report as provided to KBA's lender. (DX 457, App. 181.) The same final report noted that 16 properties within a half-mile of the Site were then known to be contaminated in one way or another, eight properties within a quarter mile were known to have

underground storage tanks, and 12 properties within a quarter mile were licensed by Hennepin County as hazardous waste generators. (*Id.*, App. 179-80.)

On February 26, 1997, KBA agreed to resell the Site to Hillcrest. (JX 23, App. 128.) An environmental study, conducted by Hillcrest as a condition on completing that transaction, confirmed the presence of PCBs at the Site. (JX 31, App. 134.) Hillcrest cancelled the purchase agreement in October 1997. (JX 37, App. 148.) KBA started this lawsuit nearly two years later.

The only evidence at trial concerning Westinghouse's operation at the Site showed that only a small number of transformers containing PCBs were repaired at the Site each year. *See* Tr. V/95, App. 230 (testimony of former Westinghouse employee estimating 1-2 PCB transformers per year); JX 9, App. 124 (only one of 15 transformers repaired at Site in 1975 contained askarels). Repairs of askarel transformers occurred only on the first floor of the building, with incidental use of the basement to hold the tank of larger transformers while the transformer cores were lifted out. (Tr. V/103-09, App. 232-34.)

The brand name for the askarel used by Westinghouse was "Inerteen." (Tr. II/28, App. 228.) Westinghouse ordered Inerteen only in small quantities as needed at the Site. (Tr. V/99; App. 231.) Inerteen was delivered in 55-gallon drums, in which it was stored until used. (*Id.*; JX 9, App. 118-19.) Westinghouse used the same 55-gallon drums to hold the Inerteen that it removed from rebuilt

transformers and shipped the drums from time to time to a distant disposal location. (Tr. V/102, App. 232; JX 9, App. 119, 121.) Westinghouse employees cleaned up any occasional spills inside the building using "floor dry or sawdust" or washed the spills down with thinner. (Tr. V/105-06, App. 233; JX 9, App. 125.)

Despite the limited evidence of Westinghouse's use of PCBs at the Site, no other source of PCBs at the Site was established at trial. On this appeal, Viacom does not dispute its responsibility for the statutory clean-up costs and for such future remedial action as the MPCA may direct.

SUMMARY OF ARGUMENT

Months before trial, Viacom entered into a legally binding Consent Order with the MPCA obligating Viacom to clean up the Site. That Order addressed all future environmental action at the Site. Had KBA used this case only to recover its past response costs, as contemplated by the comprehensive regulatory scheme of CERCLA and MERLA, allowing the MPCA to do its job of determining the proper scope of clean-up at the Site, this would have been a simple case with no appeal. Indeed, the case never would have been tried, because the amount awarded by the jury for response costs ($106,393.23) was far less than the amount Viacom offered to pay in its pretrial settlement offer.

Instead, the case ran amok. Contrary to Minnesota law, KBA was improperly awarded compensatory and punitive damages in addition to its response costs awarded under MERLA and CERCLA. The district court, relying on a MERA claim that became moot before trial, entered an improper injunction that overlaps with and has the potential to conflict with the remedies that will be required by the MPCA, the state agency with statutory jurisdiction over the clean-up.

Viacom submits:

First, the judgment on KBA's claim for strict liability in tort and the resulting award of compensatory and punitive damages should be reversed. The

law of strict liability does not afford a remedy to a subsequent owner, like KBA, of the very property on which the defendant conducted allegedly harmful activities. Most jurisdictions considering the question have held that a subsequent owner of the property on which such activities were conducted has no claim for strict liability against a prior owner. The Minnesota Supreme Court has not yet considered the precise question, but its past decisions have declined to extend the doctrine of strict liability in other respects.

Second, the award of punitive damages should be set aside because Minnesota law does not permit punitive damages on a claim for strict liability where there is no personal injury. Moreover, the jury's finding that Viacom was not negligent in its operation of the Site is inconsistent with the requirement of Minnesota law that punitive damages may be awarded only on a showing of "deliberate disregard for the rights or safety of others," which requires *more* than mere negligence. Indeed, under the standard announced by the United States Supreme Court in State Farm Mutual Automobile Insurance Co. v. Campbell, ___ U.S. ___, 2003 WL 1791206 (April 17, 2003), conduct that is not even negligent cannot, as a matter of constitutional law, support a punitive damages award.

Third, the judgment on the MERA claim and the resulting injunction should be vacated because that claim became moot before trial. Viacom's agreement with the MPCA terminated the "conduct" that KBA's MERA claim sought to correct.

Fourth, the district court abused its discretion when it failed to follow applicable law in awarding more than $1.1 million in attorneys' fees and costs under MERLA. The bulk of those fees were for work on non-MERLA claims performed after Viacom had offered to settle the case with a payment greater than the eventual verdict on the MERLA claim. The improper intermingling of plaintiff's various claims continued when the district court allowed prejudgment interest to accrue after Viacom's written offer of settlement, despite the prohibition of such interest in Minn. Stat. § 549.09, subd. 1(b).

ARGUMENT

I. A Person Whose Industrial Operation Affects His Own Property Is Not Strictly Liable to a Subsequent Owner of that Property under Minnesota Common Law.

KBA prevailed on only one of its three common-law theories: strict liability in tort for property damage incurred by KBA because of the presence of PCBs at the Site. The awards of $225,000 in compensatory damages and $5 million in punitive damages rest entirely upon this claim. (Add. 12.)

Those awards must be reversed as a matter of law. The theory of strict liability provides a cause of action only for owners of *other* property in proximity to property from which something "escapes" and causes injury. Historically, strict liability does not extend in favor of a subsequent owner, such as KBA, of the very property on which the "something" was kept in the first place. And in an era of mature environmental remedies under CERCLA, MERA, and MERLA, the Minnesota Supreme Court would not expand existing common law in this area.

A. The strict liability tort originating in Rylands v. Fletcher addressed harm caused to *neighboring* property.

The tort of strict liability for damage to real property originates in the famous English case of Rylands v. Fletcher, LR 3 H.L. 330 (1868). The defendant had built a reservoir on his own land that was adjacent to land on which the plaintiff operated a coal mine. There also were old mine shafts under the defendant's land, with which the plaintiff's shafts had connected. When the

defendant filled his reservoir, the water flowed into the old shafts under his property and flooded the plaintiff's mine. The court held the defendant liable for the plaintiff's injuries despite the absence of any fault on his part, stating the following rule: "If a person brings, or accumulates, on his land anything which, if it should escape, may cause damage *to his neighbor*, he does so at his peril." *Id.* at 340 (emphasis added).

Minnesota soon adopted the Rylands rule. Cahill v. Eastman, 18 Minn. 324 (1872). It continues to follow the original rule. Mahowald v. Minnesota Gas Co., 344 N.W.2d 856, 860-61 (Minn. 1984) (declining to follow a somewhat different statement of similar principles found in Restatement of Torts (Second) §§ 519-20); Minnesota Mining & Mfg. Co. v. Travelers Indemnity Co., 457 N.W.2d 175, 183 (Minn. 1990). The Minnesota Supreme Court has never specifically addressed the question raised in this case – whether a cause of action exists under Rylands where a past owner engaged in activities that resulted in the presence of a damaging substance *on the owner's own property* that allegedly caused injury to a subsequent owner of that same property.

Because this question is unsettled as a matter of Minnesota law, a federal court must attempt to predict the result that the Minnesota Supreme Court would apply if it were to decide the issue. This Court considers such predictions *de novo.* Salve Regina College v. Russell, 499 U.S. 225 (1991); Lederman v. Cragun's Pine

Beach Resort, 247 F.3d 812, 814 (8th Cir. 2001). In doing so, it "may consider relevant state precedent, analogous decisions, considered dicta, scholarly works and any other reliable data." Ventura v. Titan Sports, Inc., 65 F.3d 725, 729 (8th Cir. 1995). Considering these indicia in this case, this Court should conclude that Minnesota, like most other states that have addressed the question, would hold that a subsequent property owner (KBA) does not have a strict liability claim against a prior owner (Viacom) for conduct on that property (the Site).

B. Most other courts have rejected claims for strict liability in tort by subsequent owners against former owners of the same property.

Most courts that have considered the question have held that the Rylands rule provides a cause of action *only* for injury to property *other than* the property on which the activities were conducted and that it does *not* provide a cause of action for a subsequent owner for injury to the very property on which the activities were conducted by a previous owner. *See* 325-343 E. 56th St. Corp. v. Mobil Oil Corp., 906 F. Supp. 669 (D.D.C. 1995); Futura Realty v. Lone Star Building Centers, Inc., 578 So. 2d 363 (Fla. App. 1991); Rosenblatt v. Exxon Co., 642 A.2d 180 (Md. 1994); Wellesley Hills Realty Trust v. Mobil Oil Co., 747 F. Supp. 93 (D. Mass. 1990); Cross Oil Co. v. Phillips Petroleum Co., 944 F. Supp. 787 (E.D. Mo. 1996); 55 Motor Ave. Co. v. Liberty Industrial Finishing Corp., 885 F. Supp. 410 (E.D.N.Y. 1994); Dartron Corp. v. Uniroyal Chemical Co., 893 F. Supp. 730 (N.D. Ohio 1995); Hydro-Manufacturing, Inc. v. Kayser-Roth Corp.,

640 A.2d 950 (R.I. 1994); Andritz Sprout-Bauer, Inc. v. Beazer East, Inc., 174 F.R.D. 609, 623-26 (M.D. Pa. 1997) (Virginia law) (collecting cases and concluding that "It is plain from the language of [Restatement (Second) of Torts] section 519 and the common law principles from which it derives that it was not intended to extend to successors-in-title"); Jones v. Texaco, Inc., 945 F. Supp. 1037 (S.D. Tex. 1996) (if Texas recognized doctrine of strict liability, it would not provide remedy for subsequent owner of land on which allegedly harmful activity was conducted); Hicks v. Humble Oil & Refining Co., 970 S.W.2d 90, 97 (Tex. App. 1998). *But see* Hanlin Group, Inc. v. International Minerals & Chem. Corp., 759 F. Supp. 925 (D. Me. 1990); T & E Industries, Inc. v. Safety Light Corp., 587 A.2d 1249 (N.J. 1991).

The primary rationale for this great weight of authority is that the tort of strict liability was developed to protect the owner of property adjacent to a site from which a harmful release occurs because the adjacent landowner has no way to protect against injuries resulting from that release. In contrast, subsequent owners can protect against harms caused by a past release on the site either by performing due diligence (including pre-purchase inspections of the site) or by negotiating a provision in the purchase agreement that imposes on the seller the risk of undisclosed conditions. Therefore, there is no need to expand the tort to provide a remedy for a subsequent owner of the site itself.

For example, in Rosenblatt, *supra*, the court reviewed the origin of the tort of strict liability in Rylands, noting that it makes a landowner "practically an insurer of his neighbors" against damage caused by the "escape" of harmful materials from the owner's property. 642 A.2d at 186. Emphasizing that "[w]e have taken care to limit the application of this doctrine because of the heavy burden it places upon a user of land," *id.* at 187, the court concluded, *id.* at 188:

> When an owner or occupier of land engages in activities which are related to such ownership and occupation and which are abnormally dangerous in relation to the particular site, we place upon the actor the burden of bearing the risk of any harm to neighbors which arises from the activity, notwithstanding the absence of fault on the part of the actor. This burden is justified when weighing the rights of the actor, who benefits from the activity, against those of the occupants of neighboring land, who do not benefit and have no way of avoiding the harm to their property that may result from a dangerous activity on adjacent land. Subsequent users, however, are able to avoid the harm completely by inspecting the property prior to purchasing or leasing it. Thus, it is not unreasonable to expect subsequent users to bear the risk of such harm. We think, however, that it would be unreasonable to hold the prior user liable to remote purchasers or lessees of commercial property who fail to inspect adequately before taking possession of the property. . . . It would be illogical . . . to hold the actor strictly liable for harm to the actor's own property in those cases in which, at some time thereafter, the property changes hands.

C. The Minnesota Supreme Court has adhered to the original parameters of the Rylands tort.

The Minnesota Supreme Court would likely follow the weight of authority and hold that a subsequent owner such as KBA cannot assert a strict liability claim. The very language of Minnesota's strict liability cases compels such a conclusion. Consistent with the original formulation of the Rylands rule, quoted above, Minnesota law requires an "escape" of something kept by the defendant on his own property, the natural tendency of which is to do harm to others if it "escapes," *i.e.*, if it leaves the defendant's property where it was supposed to be confined and goes onto the property of another where it causes harm. *See, e.g.*, Berger v. Minneapolis Gaslight Co., 60 Minn. 296, 301, 62 N.W. 336, 338 (1895); Wiltse v. City of Red Wing, 99 Minn. 255, 260, 109 N.W. 114, 115 (1906).

The Restatement version of the tort is not similarly limited to an "escape." *See* Restatement (Second) of Torts, §§ 519-20 (1977). Significantly, in the leading case holding that a claim for strict liability may be asserted by a subsequent owner against a previous owner of the same property, the New Jersey Supreme Court applied the Restatement version of the tort in reaching its conclusion. T & E Industries, *supra*, 587 A.2d at 1259. Minnesota, however, has expressly declined to adopt the Restatement version. *See* Mahowald, *supra*, 344 N.W.2d at 860-61. Even in Massachusetts, a jurisdiction that does follow the Restatement version, the federal district court concluded that, "[d]espite the [Restatement's] expansion of

the [Rylands] rule, . . . harm to the property or person *of another* has always been required. It would be nonsensical to even formulate a rule that an actor is strictly liable for harm inflicted on his or her own property or person." Wellesley Hills, *supra*, 747 F. Supp. at 102 (emphasis in original).

Furthermore, the Minnesota Supreme Court has been reluctant to extend the doctrine of strict liability by recognizing additional types of activities as "abnormally dangerous" for purposes of the Rylands doctrine. *See* Mahowald, *supra*, 344 N.W.2d at 860-61 (refusing to extend doctrine to operation of natural gas pipelines in public streets); Ferguson v. Northern States Power Co., 307 Minn. 26, 32, 239 N.W.2d 190, 194 (1976) (same as to maintenance of high-voltage electric transmission lines); *see also* Estrem v. City of Eagan, No. C8-93-1624, 1993 WL 527888 (Minn. App., Dec. 21, 1993) (unpublished) (App. 253) (same as to "cable tool type drilling" process used in installing a well, although process included blasting).

The Minnesota Supreme Court's continuing reluctance to extend the doctrine of strict liability is consistent with decisions from other states that have refused to apply the doctrine to normal industrial activities conducted in appropriate locations, such as those involved in this case, even where those activities involve the use of potentially harmful substances. *See, e.g.*, Sprankle v. Bower Ammonia & Chemical Co., 824 F.2d 409, 414-16 (5th Cir. 1987) (storage

of large quantities of anhydrous ammonia at a manufacturing plant was not "ultrahazardous activity" to which strict liability applied); National Telephone Coop. Ass'n v. Exxon Corp., 38 F. Supp. 2d 1, 8-9 (D.D.C. 1998) (storage of gasoline in underground tanks in commercial area not "ultrahazardous" activity; distinguishing earlier case involving underground storage of gasoline adjacent to residence and "virtually on top" of drinking water well); Sealy Connecticut, Inc. v. Litton Industries, Inc., 989 F. Supp. 120, 126-27 (D. Conn. 1997) (use of hazardous wastes incidental to manufacturing not subject to strict liability; distinguishing such use from operation of a hazardous waste disposal facility, for which owner would be strictly liable).

Because the Minnesota Supreme Court has been unwilling to extend the doctrine on a case-by-case basis to include additional categories of activities, it is unlikely to extend it even more broadly to provide a remedy for an entirely new category of plaintiffs.

D. Statutory remedies make it unnecessary to expand strict liability in tort to cover damage to the actor's own property.

In light of the statutory remedies that have evolved over the past two decades, the Minnesota Supreme Court would have no reason to extend strict liability in tort to actions between successive owners of the same property. CERCLA and MERLA already have established detailed statutory schemes for the

regulation and remediation of polluted sites and for the allocation of responsibility among successive owners of those sites.

Those statutes were enacted to fill perceived gaps in remedies for environmental problems. In a law review article published shortly after MERLA's passage in 1983, the Senate Counsel at the time of enactment observed that the statute was preceded by reports to the legislature that "indicated that the common and statutory law of the early 1980's inadequately addressed the issue of harm to health, property, and the environment caused by exposure to dangerous chemicals." A. Williams, *A Legislative History of the Minnesota "Superfund" Act*, 10 WM. MITCHELL L. REV. 851, 855 (1984).

MERLA filled the perceived gaps in existing remedies (including the Rylands doctrine) and eliminated the need for courts to extend the reach of any of the common-law torts. It created a comprehensive scheme of environmental remedies, both public and private. Minn. Stat. § 115B.04, subd. 1 provides that:

> any person who is responsible for a release or threatened release of a hazardous substance from a facility is strictly liable, jointly and severally, for the following response costs and damages which result from the release or threatened release or to which the release or threatened release significantly contributes:
>
> (1) all reasonable and necessary response costs incurred by the state, a political subdivision of the state or the United States;

> (2) all reasonable and necessary removal costs incurred by any person; and
>
> (3) all damages for any injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss.

These provisions address harm to the public's resources and encourage the removal of hazardous substances from sites where they would pose a continuing risk to the public. They balance strict liability under the statute with a specification of the types of relief that can be awarded.

A separate section addresses individualized forms of harm. Minn. Stat. § 115B.05, subd. 1 provides that:

> any person who is responsible for the release of a hazardous substance from a facility is strictly liable for the following damages which result from the release or to which the release significantly contributes:
>
> (1) all damages for actual economic loss including:
>
> (i) any injury to, destruction of, or loss of any real or personal property, including relocation costs;
>
> (ii) any loss of use of real or personal property;
>
> (iii) any loss of past or future income or profits resulting from injury to, destruction of, or loss of real or personal property without regard to the ownership of the property; and
>
> (2) all damages for death, personal injury, or disease including:
>
> (i) any medical expenses, rehabilitation costs or burial expenses;

(ii) any loss of past or future income, or loss of earning capacity; and

(iii) damages for pain and suffering, including physical impairment.

These damages do not serve the same broad public purpose as the remedies under § 115B.04, and the legislature (through amendments enacted over the next few years) crafted a different balance with regard to the liability of defendants whose activities predated enactment of the statute. Again, there is strict liability, but only for damages of a limited, specified nature.

KBA recovered its past costs under its MERLA claim to the full extent authorized by the legislature in its carefully considered regulation of this field. Expanding the common law of strict liability in tort to subsequent landowners would circumvent the legislative decision (following long debate) to apply retroactive liability for past releases only to damages under § 115B.04 (removal and response costs and injury to natural resources). The legislative refinement of strict liability and its allocation of damages and responsibility has stood for two decades. No broad public policy reason has emerged to alter that legislative judgment.

Liability under either of the MERLA damages sections is limited to the "release" of hazardous substances from a "facility," and does not extend to "damages which result from the release of a pollutant or contaminant." Minn. Stat.

§§ 115B.04, subd. 2, 115B.05, subd. 2. The statutory definitions of these and other terms, *see* Minn. Stat. § 115B.02, as well as the defenses to and limitations on statutory liability in Minn. Stat. §§ 115B.04, subds. 2-12, 115B.05, subds. 2-10, reflect considered legislative judgments of how far to extend the prior common-law torts. *See* Williams, *supra*, 10 WM. MITCHELL L. REV. at 864-95. They are part of a "comprehensive statutory scheme." *Id.* at 860.

The MERLA remedies "update[d] the old statutory and common law liabilities, which have proved to be ill-suited for the prompt resolution of toxic tort injuries." Minnesota Mining & Mfg. Co. v. Travelers Indemnity Co., 457 N.W.2d 175, 183 (Minn. 1990) (holding that manufacturers had reasonable expectation that their insurance policies would cover their MERLA liabilities, whether as money damages or costs incurred in complying with clean-up orders, arising from damage caused to the public property of the state). With the updating that has been accomplished by statute, there is no broad public policy reason for courts to extend the common law of strict liability in tort.

Indeed, public policy counsels ***against*** piecemeal expansions of the common-law Rylands tort, as the district court has done in this case. CERCLA and MERLA provide clear and distinct responsibilities that both buyers and sellers of commercial real estate can anticipate and consider in the course of their transactions. Retroactive application of common-law duties would introduce

elements of uncertainty that could inhibit future real estate transactions involving industrial properties. Minnesota courts try to avoid uncertainty in real estate law. *Cf.* Novus Equities Corp. v. EM-TY Partnership, 381 N.W.2d 426, 429 (Minn. 1986) (noting "the law's desire to avoid needless uncertainty in real estate transactions"); Title Insurance Co. v. Agora Leases, Inc., 320 N.W.2d 884, 885 (Minn. 1982) (similarly noting "the importance of certainty in real estate law").

* * *

Following *de novo* review of this purely legal question concerning state law, this Court should conclude that the Minnesota Supreme Court would not expand the doctrine of strict liability to provide a cause of action for a subsequent property owner, such as KBA in this case, for alleged damage to the property due to activities of a former owner. Expanding the doctrine in this case would alter a legislative judgment that has stood for two decades and a judicial articulation of the common law by Minnesota courts that has remained substantially unchanged for more than 130 years, simply to enhance KBA's monetary recovery. Existing law provides substantial remedies. No public policy would be served by expanding the doctrine of strict liability to provide KBA with a windfall.

This Court should therefore reverse the common-law strict liability judgment for compensatory and punitive damages, and remand the case with instructions to the district court to dismiss that claim.

II. The Punitive Damages Award Should be Reversed.

A. KBA's strict liability claim for property damage does not support an award of punitive damages.

The punitive damages award was based solely upon the jury's verdict in favor of KBA on the common-law strict liability claim. (Add. 12.) That award cannot stand, for two reasons. First, the Minnesota Supreme Court would not recognize a strict liability claim under the circumstances of this case. *See* Section I above. Second, Minnesota law does not permit an award of punitive damages on a claim for strict liability where, as in this case, there is no personal injury. This Court reviews *de novo* such determinations and applications of state law. Salve Regina College v. Russell, *supra*; Lederman v. Cragun's Pine Beach Resort, *supra*.

In Eisert v. Greenberg Roofing & Sheet Metal Co., 314 N.W.2d 226, 229 (Minn. 1982), the Minnesota Supreme Court held that "[t]he interests implicated in strict liability actions for injury solely to property are not so great as to warrant extension of this controversial remedy [*i.e.*, punitive damages] to those actions." *See also* Williams Pipe Line Co. v. City of Mounds View, 704 F. Supp. 914, 921 (D. Minn. 1989) ("A review of Minnesota law shows that punitive damages . . . are precluded for any strict liability claim.").

In Jensen v. Walsh, 623 N.W.2d 247 (Minn. 2001), the Minnesota Supreme Court reconsidered the availability of punitive damages in cases where only

property damage, and no personal injury, has occurred. It discussed previous precedents, including Eisert, and concluded that they did not preclude an award of punitive damages "in an action *for intentional damage to property* where the only damage is to property." *Id*. at 248 (emphasis added). In so holding, the Court overruled another of its decisions, Independent School District No. 622 v. Keene Corp., 511 N.W.2d 728 (Minn. 1994), to the extent that Keene could be construed as barring punitive damages in actions for intentional damage to property. Jensen, 623 N.W.2d at 251 n.4. But the Minnesota Supreme Court did not overrule Eisert's holding that punitive damages are barred on a strict liability claim where, as here, the only damage is unintentional injury to property.

There was no evidence that Westinghouse intentionally damaged the Site. The jury was not asked to find whether the Site had been intentionally contaminated and was not given any instruction to guide such a determination. Jensen therefore is inapplicable. This case involves strict liability, not intentional damage. KBA claimed only injury to property, and it prevailed only on its strict liability claim. The Eisert prohibition on punitive damages in those circumstances controls this case. Under Eisert, the punitive damages award in this case must be reversed.

B. The punitive damages verdict cannot be reconciled with the verdict on negligence.

The jury found that Westinghouse was not even negligent in its conduct at the Site. (Add. 3.) This finding is irreconcilable with the jury's award of punitive damages, because the standard for such an award requires conduct significantly more egregious than mere negligence. Under Minnesota law, punitive damages may be awarded only "upon clear and convincing evidence that the acts of the defendant show deliberate disregard for the rights or safety of others." Minn. Stat. § 549.20, subd. 1(a). "Deliberate disregard" is shown if

> the defendant has knowledge of facts or intentionally disregards facts that create a high probability of injury to the rights or safety of others and:
>
> (1) deliberately proceeds to act in conscious or intentional disregard of the high degree of probability of injury to the rights or safety of others; or
>
> (2) deliberately proceeds to act with indifference to the high probability of injury to the rights or safety of others.

Id. subd. 1(b).

Plaintiffs cannot meet the Minnesota statutory standard for awarding punitive damages with "[a] mere showing of negligence . . . ; instead, the conduct must be done with malicious, willful, or reckless disregard for the rights of others." Admiral Merchants Motor Freight, Inc. v. O'Connor & Hannan, 494 N.W.2d 261, 268 (Minn. 1992); *see also, e.g.*, Johns v. Harborage I, Ltd., 585 N.W.2d 853, 863

(Minn. App. 1998); Hern v. Bankers Life Casualty Co., 133 F. Supp. 2d 1130, 1135 (D. Minn. 2001). Even gross negligence is not sufficient to sustain an award of punitive damages under Minnesota law. Wirig v. Kinney Shoe Corp., 461 N.W.2d 374, 381 (Minn. 1990).

A finding of mere negligence, or even a finding of gross negligence, likewise would not meet the constitutional threshold for an award of punitive damages. As the United States Supreme Court recently emphasized, "the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." State Farm Mutual Automobile Insurance Co. v. Campbell, __ U.S. ___, 2003 WL 1791206, at * 8 (April 7, 2003), *quoting* BMW of North America, Inc. v. Gore, 517 U.S. 559, 575 (1996). In determining reprehensibility, courts must consider whether:

> [1] the harm caused was physical as opposed to economic; [2] the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; [3] the target of the conduct had financial vulnerability; [4] the conduct involved repeated actions or was an isolated incident; and [5] the harm was the result of intentional malice, trickery, or deceit, or mere accident. . . . The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect.

Id. In the present case, of course, (1) any harm to KBA was economic, not physical; (2) there was no health or safety risk to KBA; (3) the "target of the

conduct" (whether that is considered to be KBA as the plaintiff or Westinghouse itself as the owner of the property at the time of the conduct) was not financially vulnerable; and (4) & (5) the conduct at the Site was an accidental, intermittent part of industrial operations typical of the times during which they occurred. The jury's finding that Viacom did not act with *any* negligence simply underscores the "suspect" nature of the punitive damages award.

Because under Minnesota law punitive damages may not be awarded upon a showing that a defendant was merely negligent, it follows that they may not be awarded where, as here, the jury found that the defendant was *not at all* negligent. Put another way, if a jury finds that a defendant exercised reasonable care in its relevant conduct, then that same conduct logically cannot be found to have displayed the punitive damages requirement of a "malicious, willful, or reckless disregard" for the rights of others. There is no rational basis on which the jury could have found that Westinghouse, in connection with its operations at the Site, simultaneously (1) exercised due care in connection and (2) acted maliciously, willfully, or recklessly.

A question that the jury sent to the district court shortly before it returned its verdict provides some insight into its inconsistent verdict:

> Would you please explain to us "punitive damages." Do we as a jury get to decide where and how the funds are distributed? Meaning, can we specify that these funds must be used to clean up this property? Or go to the

> MPCA to clean up the property, or do they go to KBA to use as they see fit? (Do they pocket the money?)

(Tr.VIII/2, App. 251.) The court replied that "punitive damages are awarded to the defendant . . . er, to the plaintiff." (Tr.VIII/3, lines 12, 18, App. 252.) The jury then returned its punitive damages verdict for $5,000,000 – an amount tellingly close to KBA's grandiose clean-up estimates of $5,048,000. (*See* PX 357, App. 161 ($3.23 million for clean-up outside the building); PX 358, App. 162 (up to $1.818 million for clean-up inside the building).)

The punitive damages award likely was caused by KBA's closing argument that repeatedly pandered to prejudice and encouraged the jury to impose punitive damages for reasons that Minnesota law does not allow. Even though Viacom had signed the Consent Order with the MPCA more than four months before trial began, KBA's counsel told the jury that Viacom had entered into the Order "at the twelfth hour" (Tr.VII/72, App. 246) as "a trial strategy for your [the jury's] benefit and your benefit only" (Tr.VII/54, App. 243). The Consent Order is legally enforceable by the MPCA to the same extent as a civil court judgment, Minnesota Mining & Mfg. Co. v. Travelers Indemnity Co., 457 N.W.2d 175, 183 (Minn. 1990), but KBA's counsel told the jury that Viacom's promise to clean up the Site was "empty, meaningless" (Tr.VII/61, App. 245; *see also* Tr.VII/54, App. 243 ("they are not going to do a thing"); Tr. VII/57, App. 244 ("they're not going to clean it up"); Tr. VII/61, App. 245 ("They're not gonna do anything about it"); Tr.

VII/69, App. 246 ("They're not gonna clean it up"); Tr. VII/72-73, App. 246-47 (claiming Viacom would "steamroll" the MPCA with "a rope-a-dope strategy"); Tr. VII/78, App. 248 (accusing Viacom of "fraudulently telling you what they're going to do").) He twice stated that "they don't care about the state of Minnesota" (Tr.VII/61, 72, App. 245, 246) and asserted that "[w]hat they want to do is leave the PCBs in Minnesota and go back to Pittsburgh. They want to leave the PCBs in the soil, in the groundwater, under the building, and go back to Pittsburgh." (Tr.VII/72, App. 246.)

KBA's argument thus suggested that the Site would not be cleaned up unless the jury awarded punitive damages. That argument ignored the facts that site clean-up is not a remedy available to KBA under any of its statutory or common-law claims, that KBA could not be required to use any punitive damages awarded to it for that purpose, and that a clean-up would occur regardless of whether punitive damages were awarded.

KBA also entreated the jury to "send a message to corporate America, . . . to the east coast, . . . to Wall Street" (Tr. VII/76, App. 247), to "the suits" and "senior upper level executives" (Tr. VII/57, App. 244), because of Westinghouse's "corporate culture" (Tr. VII/58, App. 244). KBA thus encouraged the jury to punish Viacom more because KBA considered Westinghouse to be an unsavory business in general than because of any conduct that actually harmed KBA at the

Minneapolis Site. That tactic resulted in an award that violates the admonition of the United States Supreme Court that a State may not impose punitive damages to punish a defendant for acts, lawful or unlawful, committed outside of the State's jurisdiction. State Farm, *supra*, 2003 WL 1791206, at *9.

When Viacom objected to KBA's improper argument (Tr. VII/79-81, App. 248-49), the district court simply informed the jury that, "at various times in their arguments, *the lawyers* got kind of expansive" (emphasis added – suggesting errors on both sides), that comments by counsel on the credibility of a particular witness were not evidence, and that the jury itself should determine credibility. (Tr.VII/83, App. 249.) This tepid comment clearly did nothing to prevent KBA's improper argument from having its desired effect on the jury's deliberations.

This Court, however, must not be swayed by such improper considerations. The jury found that Viacom was not negligent at all, and Minnesota's legal standard for punitive damages requires conduct significantly *more* culpable than even *gross* negligence. There simply is no principled way to reconcile the jury verdicts finding no negligence by Viacom yet simultaneously awarding punitive damages to KBA. Because of the inconsistent verdicts, the judgment in favor of KBA on punitive damages must be reversed and remanded, either (1) with instructions to enter judgment in favor of Viacom as a matter of law, *see* Bird v. John Chezik Homerun, Inc., 152 F.3d 1014, 1017 (8th Cir. 1998), or (2) for new

trial, *see* Harris v. Niagara Mohawk Power Corp., 252 F.3d 592, 598-99 (2d Cir. 2001).

III. The MERA Claim Was Moot.

The district court erred as a matter of law in submitting KBA's MERA claim to the jury and subsequently in granting injunctive relief premised solely on the alleged violation of that statute. That claim became moot as soon as Viacom entered into the Consent Order with the MPCA. Under that order, Viacom obligated itself to clean up the PCB contamination at the Site to standards that the agency will determine. Viacom signed the order on September 19, 2001, and the MPCA signed it on January 22, 2002. (Add. 31-44.) By the time of trial, Viacom already had incurred investigation costs associated with the clean-up, such as collecting soil samples and drilling monitoring wells. (*See* Tr. V/179-80, App. 241; Tr. VI/14-15, App. 242.)

MERA is a "private attorney general" statute, under which a private party may bring suit "in the name of the state of Minnesota" to protect natural resources from "pollution, impairment, or destruction." Minn. Stat. § 116B.03. The statute's primary purpose is preventing on-going pollution.

MERA does not "contemplate affirmative injunctive relief that essentially amounts to an order to clean up past pollution." Werlein v. United States, 746 F. Supp. 887, 898 (D. Minn. 1990), *vacated in part on other grounds*, 793 F. Supp.

898 (D. Minn. 1992). The proper statutory basis for an injunction to clean up past pollution is a proceeding under MERLA, and only the MPCA and the Minnesota attorney general are empowered to seek such injunctions under MERLA. *See* Minn. Stat. §§ 115B.17-.18. Private parties such as KBA cannot seek injunctions to clean up past pollution under either MERA or MERLA.

A claim becomes moot and must be dismissed, and injunctive relief based on that claim must be denied, if the conduct or condition that the plaintiff seeks to enjoin ceases after the complaint is filed. Thus, in Comfort Lake Association, Inc. v. Dresel Contracting, Inc., 138 F.3d 351 (8th Cir. 1998), the plaintiff's citizen suit sought injunctive relief and civil penalties for alleged violations of the federal Clean Water Act. After the action was filed, the defendants took corrective actions that the MPCA determined had cured the violations. The MPCA, which was charged with enforcing the Act, also entered into a consent order with the defendant concerning penalties for past violations. Upon defendant's motion and over the plaintiff's objection, the district court therefore dismissed the claim for injunctive relief as moot. This Court affirmed, noting: "A claim for injunctive relief may become moot if challenged conduct permanently ceases." *Id*. at 354. *Accord* Grandson v. University of Minnesota, 272 F.3d 568 (8th Cir. 2001), *cert. denied*, 535 U.S. 1054 (2002) (claim that University discriminated against female athletes and that injunction should be issued to compel establishment of women's

hockey team became moot when University entered into agreement with Office of Civil Rights to establish hockey team); Mississippi River Revival, Inc. v. City of Minneapolis, 319 F.3d 1013, 1016-17 (8th Cir. 2003) (complaint seeking injunction against continued operations without permit required under Clean Water Act became moot once permit was obtained); Atlantic States Legal Foundation v. Tyson Foods, Inc., 897 F.2d 1128, 1134-35 (11th Cir. 1990) (same); Orange Environment, Inc. v. County of Orange, 923 F. Supp. 529, 538-40 (S.D.N.Y. 1996) (same).

In view of these principles, the district court erred in this case when it did not dismiss KBA's MERA claim as moot once Viacom entered into the Consent Order with the MPCA, because that Order provided all the relief that properly could have been granted under MERA. "The doctrine that federal courts may not decide moot cases 'derives from the requirement of Article III of the Constitution under which the exercise of judicial power depends upon the existence of a case or controversy.'" Comfort Lake, *supra*, 138 F.3d at 354, *quoting* Liner v. Jafco, Inc., 375 U.S. 301, 306 n.3 (1964); *accord* Crain v. Board of Police Commissioners, 920 F.2d 1402, 1405 n.3 (8th Cir. 1990) ("standing and mootness are jurisdictional issues"). Lack of subject-matter jurisdiction is such a basic concern that a court of appeals must raise the issue on its own if the parties have not raised it or the district court overlooked it. Bender v. Williamsport Area School Dist., 475 U.S. 534, 541

(1986); Magee v. Exxon Corp., 135 F.3d 599, 601 (8th Cir. 1998). *See also* Fed. R. Civ. P. 12(h)(3) ("Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.").

KBA's MERA claim alleged that Viacom's "failure to take action to halt the continuing contamination of the soil and groundwater" at the Site was "conduct" that threatened the environment within the meaning of the statute, and it sought an injunction "mandating that Defendant *respond to the PCB contamination*" at the Site. (App. 49, 53; emphasis added.) Whatever its initial viability may have been, this claim became moot before trial, when Viacom *took action* to halt the alleged continuing contamination – that is, it *did* "respond" – by entering into a legally binding Consent Order with the MPCA. (Add. 33-34; Tr. V/173-74, 177-78, App. 240-41.) That Order commits Viacom to take whatever actions to clean up the Site the agency requires after further study and ended whatever alleged "inaction" MERA may have authorized the district court to remedy. Because the state itself had asserted its plenary authority to supervise Viacom's clean-up of the Site, the Order terminated any need for a "private attorney general" to act "on behalf of the state" to end the "inaction."

Indeed, the text of MERA itself barred continued litigation of KBA's MERA claim as of the effective date of the Consent Order. Minn. Stat. § 116B.03, subd.

1, provides that "no action shall be allowable under [MERA] for conduct taken by a person pursuant to any . . . order, license, stipulation agreement or permit issued by the pollution control agency . . . ." *See* Holte v. State, 467 N.W.2d 346, 349 (Minn. App. 1991) ("MERA contains an exception for activities ordered" by certain state agencies).

KBA alleged that the "conduct" of Viacom that it sought to enjoin was Viacom's inaction in failing to abate the PCB contamination of the Site. This allegation ignores the fact that, once the Consent Order became effective, Viacom could take action with respect to the Site only in accordance with the Order. Viacom is working with the MPCA on the investigative and planning steps that the MPCA will review and approve in connection with any remedial action. (Add. 34.) Under § 116B.03, therefore, no further legal action under MERA should have been "allowed" with respect to Viacom's "conduct."

The district court plainly lacked authority to substitute its own views about Viacom's compliance with the Consent Order for those of the responsible state agency. (*See* Add. 10.) In any event, the Consent Order was so new at the time of trial that there could be no rational basis to make any determination concerning Viacom's complaince. Although Viacom had committed itself to the Order in September 2001, more than four months before the trial began, the MPCA did not finally approve the Order until a week before trial. As a result, Viacom's

compliance had barely begun when the case was tried. Moreover, the court permitted only minimal testimony concerning the various steps – a remedial investigation and a feasibility study – that Viacom was required to undertake before the MPCA determines what Viacom must do to clean up the Site, and it curtailed testimony about what Viacom already had done to accomplish those steps, admonishing Viacom's counsel to "get on to something more substantive." (Tr. V/175, 177, App. 240, 241.) In short, having refused to permit testimony at trial about Viacom's compliance with the Consent Order, the court had no legitimate basis for its finding that Viacom had not complied.

Once the MPCA had asserted its authority in this matter, Viacom's subsequent compliance with the Order became the sole responsibility of the MPCA as the state agency responsible for enforcing MERLA and protecting the natural resources of the State, and not the concern of the district court in a private suit asserting a MERA claim. The MERA claim had become moot and, in fact, was barred by the statute itself. The situation is indistinguishable from that described in City of St. Paul v. Gopher State Ethanol, LLC, No. C1-02-9083, Order at 4 (Ramsey Cty., Minn. Dist. Ct., Feb. 11, 2003) (App.255), in which, as here, the defendant had entered into a settlement agreement with the MPCA to correct the condition about which the plaintiff complained under MERA. The court therefore dismissed the MERA claim, saying (*id.* at 4, App. 260):

> By this lawsuit the [plaintiff] would have the Court substitute its judgment (or the judgment of the [plaintiff]) in place of the agencies (the MPCA and the EPA) on matters within the discretion of those agencies (i.e. how to interpret the agreement, whether standards are being met and whether remedial actions are appropriate). This Court is neither free nor willing to do so. [Citation omitted.] Accordingly, the Court concludes that the [challenged activity] is conduct taken pursuant to a stipulation agreement and the statute bars [plaintiff's] MERA claim . . . .

KBA's desire for a more extensive clean-up than the MPCA is likely to require (*see, e.g.*, KBA's closing argument at trial, Tr. VII/54, 72, App. 243. 246) does not affect the mootness analysis. As another court has observed:

> The fact that the remediation order here does not meet the desires of the private parties is not crucial. . . . [T]he "thrust of the CWA is to provide *society* with a remedy against polluters in the interest of protecting the environment. If the government's action achieves that end, the fact that . . . any other private attorney general is barred from duplicating that effort should hardly seem surprising or harsh." . . . Parties "bringing citizen suits under the CWA are not entitled to maintain their actions simply to secure 'personalized' relief."

Orange Environment, *supra*, 923 F. Supp. at 539 (original emphasis; internal citations omitted). *See also* Comfort Lake, *supra,* 138 F.3d at 357 ("While Comfort Lake might have preferred more severe civil penalties, MPCA has the primary responsibility for enforcing the Clean Water Act.").

To the extent that the district court's injunction may be interpreted to require more clean-up than the MPCA eventually determines is necessary, the injunction is

not permitted by MERA. To the extent that it may mirror the MPCA Consent Order, it is superfluous. Either way, KBA's MERA claim is moot and should have been dismissed. Because that claim is the exclusive basis invoked by the district court in entering an injunction against Viacom, this Court should vacate the injunction.

IV. The District Court Improperly Awarded Attorneys' Fees and Prejudgment Interest Beyond the Scope of the Applicable Minnesota Statutes.

A. The MERLA judgment of $106,393 does not justify an attorneys' fee award of $1,113,915.

The district court declared that KBA was entitled to recover its costs and attorneys' fees pursuant to Minn. Stat. § 115B.14 (MERLA). (Add. 11.) That statute is the only basis for any award of fees and costs in this case. But the court awarded fees that sprawl far beyond MERLA, including work on KBA's statutory and common-law claims that sought fundamentally different relief and that continued long after Viacom proposed a settlement that exceeded KBA's eventual MERLA recovery. The district court uncritically accepted every entry that KBA's counsel submitted, allowing KBA to recover fees even for three paralegals and a clerical assistant simply to observe closing arguments (App. 190).

That fee award cannot stand. The district court abused its discretion by failing to follow the correct legal standards. *See, e.g.*, Computrol, Inc. v. Newtrend, L.P., 203 F.3d 1064, 1070 (8th Cir. 2000) (when district court makes

error of law, appellate review for abuse of discretion amounts to *de novo* review of question of law); Williams v. Carter, 10 F.3d 563, 566 (8th Cir. 1993) (court abuses its discretion when it does not consider relevant factor that should have been given significant weight, or when it commits clear error of judgment in weighing relevant factors).

The district court improperly awarded fees to KBA for legal services not substantially related to the MERLA claim. As the Supreme Court explained in Hensley v. Eckerhart, 461 U.S. 424, 434-35 (1983), the "congressional intent to limit awards to prevailing parties requires that … unrelated claims be treated as if they had been raised in separate lawsuits, and therefore no fee may be awarded for services on the [separate] unsuccessful claim." Thus, in Peacock v. 21st Century Wireless Group, Inc., 285 F.3d 1079, 1086 (8th Cir. 2002), this Court affirmed the district court's award of only 15% of the fees requested, because "most of the trial preparation and the entire trial were related to appellants' unsuccessful claims."

Hensley did note that in some cases "the plaintiff's claims for relief will involve a common core of facts or will be based on related legal theories. Much of counsel's time will be devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis." *Id.* at 435. However, this latitude logically cannot extend to a situation where, as here,

attorney time records specifically identify hours spent on particular claims, thus simplifying allocations among fee and non-fee claims.

A statutory basis for fees for a single claim cannot routinely be leveraged into an award of ***all*** fees incurred during multi-claim litigation. For example, in Gopher Oil Co. v. Union Oil Co., 757 F. Supp. 998 (D. Minn. 1991), *aff'd in part, rev'd in part*, 955 F.2d 519 (8th Cir. 1992), the district court could "find no persuasive reason why Gopher Oil should be allowed to recover attorneys' fees for its non-fraud common law claims" of (among others) negligence and nuisance, because those claims were distinct from its CERCLA and MERLA claims. 757 F. Supp. at 1009. Just as in Gopher Oil, KBA's unsuccessful nuisance and negligence claims are distinct from its successful MERLA claim, and there should be no award for work on those unsuccessful claims.

This Court went even further in Gopher Oil. Although it agreed that plaintiff's successful fraud claim was "factually intertwined with" the MERLA claim, it reversed the district court's award of fees because the plaintiff's pursuit of the fraud claim served a purpose overriding the relief sought under MERLA (namely, insulating the plaintiff from contribution claims). 955 F.2d at 527. Similarly, KBA's successful strict liability and MERA claims here sought relief (punitive damages and an injunction, respectively) beyond the scope of MERLA.

In Musicland Group, Inc. v. Ceridian Corp., 508 N.W.2d 524 (Minn. App. 1993), decided two years after Gopher Oil, the plaintiff recovered past clean-up costs and economic losses on a negligence claim and recovered removal costs and economic losses under MERLA. The Minnesota Court of Appeals applied three factors for allowing fees for claims that do not have an independent basis for a fee award: (1) the legal theories must require proof of a common core of facts; (2) the other claims must be intertwined with the MERLA claim; and (3) the "purpose" of the claims must be the same, that is "the types of relief requested" must be similar. In Musicland, all the relevant claims requested similar types of relief because all "involved compensation for the loss of use of Musicland's property." *Id.* at 535. In this case, in contrast, KBA's requests for punitive damages and an injunction served purposes distinct from compensation for loss of use of property.

The Minnesota Legislature has clearly distinguished between the remedies available under MERA and MERLA. MERA's authors deliberately decided not to provide damages as a form of relief. *See* Note, *The Minnesota Environmental Rights Act*, 56 MINN. L. REV. 575, 578 (1972); *id.* at 582 (discussing defeat of amendment to add damages as a remedy). They also decided not to provide for awards of attorney fees and costs to the prevailing party. *Id.* at 578. This legislation "was generally viewed, both by the legislature and the public, as a tool to prevent further harm to the environment, not as a way to punish persons for

harm already done to natural resources in the state." *Id.* at 617. In contrast, MERLA ***does*** permit recovery of a range of damages for past harm caused by a "hazardous substance." *See* Minn. Stat. § 115B.04, subd. 1,§ 115B.05, subd. 1. It also provides for attorneys' fees and costs. *See* Minn. Stat. § 115B.14. It does not, however, provide for injunctive relief as a private remedy.

The district court constructed a Hensley - type "common core of facts" from essentially only two components: (1) a link between the defendant and the condition of the Site, and (2) the necessity of remedial action at the Site. (Add. 20-21.) That analysis glosses over the fact that such basic "common issues" as the sources of alleged harm to natural resources and the necessity of remedying that harm must be addressed in virtually every case under either MERLA or MERA. Those two ***necessary*** elements of any environmental claim, however, are not ***sufficient*** to establish either claim. Despite such inevitable commonality at the most general level, at no time during MERLA's enactment or in the two subsequent decades has the legislature departed from its initial determination ***not*** to allow awards of attorneys fees and costs in MERA actions. The district court properly could award attorneys' fees to KBA for services in connection with its MERLA claim, but it should not have defied the legislative determination that fees cannot be recovered for services rendered in connection with KBA's MERA claim.

Courts also must consider the overall result obtained when they award fees. Hensley, 461 U.S. at 435; Williams v. Trans World Airlines, Inc., 660 F.2d 1267, 1274 (8th Cir. 1981) ("A fair attorney's fee must be realistic and bear some reasonable relationship to the right to be vindicated and the damages sought."); cf. Marek v. Chesny, 473 U.S. 1, 11 (1985) ("In a case where a rejected settlement offer exceeds the ultimate recovery, the plaintiff – although technically the prevailing party – has not received any monetary benefits from the postoffer services of his attorney.").

As early as December 1999, within two months after this lawsuit was filed, Viacom offered to conduct the entire clean-up subject only to *some* financial participation by KBA. KBA summarily rejected that offer. (App. 193.) On June 18, 2001, more than seven months before trial, Viacom made a written offer of settlement that included payment of $400,000 and clean-up of the Site with *no* financial participation by KBA. (App. 195, 200.) KBA made no written counter-proposal. That offer exceeded KBA's trial recovery of $106,393.23 on its MERLA claim. Even adding in the $225,000 compensatory damage award on strict liability, KBA did not receive any monetary benefits from the post-offer services of its attorneys (apart from punitive damages, which KBA concedes cannot be considered when awarding fees). *See also* Jenkins v. Missouri, 127 F.3d 709, 718-20 (8th Cir. 1997) (reducing requested fees by 50% to reflect limited success);

First State Bank of Floodwood v. Jubie, 86 F.3d 755, 761 (8th Cir. 1996) (affirming reduction of fee award in light of limited success); Tanenbaum v. Agri-Capital, Inc., 885 F.2d 464, 471 (8th Cir. 1989) (in suit for $75,000, court awarded $8,500 in fees out of requested $26,000). The award should not have included post-offer fees.

The district court should have reduced the requested fees in light of these factors, but it did not do so. This Court should reverse the award of fees and costs and remand for further consideration of an appropriate award.

B. Prejudgment interest should not have accrued after Viacom's settlement offer.

The question of prejudgment interest is a substantive question of law, reviewed *de novo* and controlled by state law in this diversity action. Swope v. Siegel-Robert, Inc., 243 F.3d 486, 497 (8th Cir.), *cert. denied*, 534 U.S. 887 (2001). The district court awarded prejudgment interest totaling $41,677.89 based solely upon Minn. Stat. § 549.09, subd. 1. (Add. 16-19.) That statute allows prejudgment interest on "pecuniary damages" but expressly disallows prejudgment interest on awards of future damages and punitive damages. The statute also provides that a defendant's written settlement offer stops the accumulation of prejudgment interest after the date of the offer, if it is closer to the final judgment than the plaintiff's written counter-offer.

Viacom's June 18, 2001, written settlement offer of $400,000 (App. 195, 200) controls the analysis under the statute. It clearly and definitely would have disposed of KBA's claims for response costs and past compensatory damages. As a matter of law, it should terminate any accumulation of interest after its date, because plaintiff made no written counter-offer. Hodder v. Goodyear Tire & Rubber Co., 426 N.W.2d 826, 841 n.17 (Minn. 1988).

The district court concluded that the terms of Viacom's offer were "not sufficiently precise to afford it the benefit of the provision of the statute which would terminate the accumulation of interest," because the terms "were not sufficiently 'clear and definite' to 'dispose completely of the claims' between the parties." (Add. 18.) The court did not explain this conclusion. If the court based its conclusion on factors of future damages, punitive damages, or injunctive relief, it erred as a matter of law. The prejudgment interest statute expressly excludes interest on claims for future damages and punitive damages. It is obviously impossible to calculate interest on injunctive relief. Such claims therefore cannot be factors in considering the sufficiency of offers under the prejudgment interest statute. *Cf.* Hodder, 426 N.W.2d at 841 n.18 (punitive damages award not considered in prejudgment interest analysis). In short, Viacom's offer was clear and definite and would have completely disposed of the only aspects of the verdict on which prejudgment interest is allowed.

Viacom's written offer satisfied the statutory purpose of promoting settlement of the claims for which prejudgment interest might be awarded and clearly stated a position as to those claims. *Id.*; *see also* Note, *The Minnesota Prejudgment Interest Amendment: An Analysis of the Offer-Counteroffer Provision*, 69 MINN. L. REV. 1401, 1422 (1985). KBA was entitled to prejudgment interest only prior to June 18, 2001, on damages that it had sustained as of that date. This Court should reverse the excessive award.

CONCLUSION

Viacom has been compelled to bring this appeal because the district court entered an injunction based upon a moot claim, improperly allowed punitive damages on a legal theory that is not recognized in Minnesota law, and erroneously intermingled distinct legal claims in awarding attorneys' fees and calculating prejudgment interest. It falls to this Court, therefore, to restore the present dispute to its proper bounds, to prevent an improper and unnecessary extension of Minnesota common law, and to confirm the primary role of the MPCA in supervising environmental clean-up operations at particular sites.

This Court should reverse the judgment for strict liability in tort and the associated award of compensatory and punitive damages, because Minnesota law would not recognize a strict liability cause of action for a party in the position of KBA. It also should reverse the punitive damages award – because none of plaintiff's legal claims permits such a remedy, because a punitive award is inconsistent with the jury's finding of no negligence, and because such a windfall to plaintiff serves no public policy. This Court should reverse the judgment on KBA's MERA claim as moot and vacate the injunction based on that claim. Finally, the Court should reverse the award of attorney fees and remand for further consideration applying correct legal standards, and should remand for calculation

of an award of pre-judgment interest consisting only of interest accumulating before June 18, 2001, on damages incurred prior to that date.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned, counsel of record for appellant Viacom, Inc., certifies, pursuant to Fed. R. App. P. 32(a)(7)(B) - (C) and Eighth Circuit Rule 28A(c) - (d), that this brief complies with the following requirements:

(i) The number of words in the brief is 11,895;

(ii) The name and version of the word processing software used to prepare the brief was Microsoft Word 97;

(iii) The diskette containing the full text of this brief has been scanned for viruses using the Trend OfficeScan 3.53.

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Counsel for Appellant